

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUQUAN ABRAM HICKS,

Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 266085
Wayne Circuit Court
LC No. 05-002226-01

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316, intentional discharge of a firearm at dwelling or occupied structure, MCL 750.234b, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and assault with intent to murder, MCL 750.83. Defendant was sentenced to life in prison for his first-degree murder conviction, two to four years in prison for his intentional discharge of a firearm conviction, two years in prison for each felony-firearm conviction, and 225 months to 50 years in prison for his assault with intent to murder conviction. We affirm.

Defendant argues that the trial court's instruction regarding the specific intent element of aiding and abetting was erroneous. A defendant must object below to an alleged instructional error or request that a particular instruction be given to preserve an instructional issue for appeal. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003), disapproved of on other grounds 469 Mich 966, 967 (2003). However, a defense attorney's express approval of a jury instruction, as opposed to a mere failure to object, constitutes a "waiver that *extinguishes* any error," thereby precluding appellate review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (emphasis in original). Here, defense counsel not only failed to object to the instructions, but indicated his satisfaction with them. Therefore, this issue has been waived.

Notwithstanding this, the trial court provided the standard aiding and abetting instruction, CJI2d 8.1, which accurately reflected the law. See *People v Champion*, 97 Mich App 25, 32;

293 NW2d 715 (1980), rev'd on other grounds 411 Mich 468 (1981).¹ Further, “aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal *or* know that the principal has that intent.” *People v King*, 210 Mich App 425, 430; 534 NW2d 534 (1995) (emphasis supplied). The trial court’s instruction was proper. See *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001) (a trial court is required to clearly present a case and instruct the jury on the applicable law).

Defendant argues that trial counsel’s failure to object constituted a “serious mistake.”² However, “[d]efense counsel is not required to make a meritless motion or a futile objection.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Given that the instruction was proper, defense counsel’s failure to object was not objectively unreasonable or outcome-determinative. See *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Therefore, reversal is unwarranted.

Defendant next argues that the evidence was insufficient to support his first-degree murder and assault with intent to murder convictions. We disagree. To sustain a conviction, due process requires the evidence to show guilt beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). In analyzing the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court does not consider whether any evidence existed that could support a conviction, but instead determines whether a rational trier of fact could have found that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

It is the role of the trier of fact, rather than this Court, to draw reasonable inferences from the evidence and accord the proper weight to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Issues of credibility are also left to the trier of fact rather than this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court must resolve all conflicts of evidence in favor of the prosecution, who need not negate every reasonable theory of innocence, but only prove its case beyond a reasonable doubt, despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of first-degree premeditated murder are that a “defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); MCL 750.316. Premeditation and deliberation require that the defendant had sufficient time for a second look and may be inferred from the circumstances surrounding the killing. *Id.* “Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant’s actions

¹ We note that our Supreme Court has not officially sanctioned the Michigan Criminal Jury Instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

² We note that defendant failed to include the issue of ineffective assistance of counsel in his statement of questions presented for appeal, and it is therefore not properly before this Court. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000), and MCR 7.212(C)(5).

before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.*

"The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995); MCL 750.83. Minimal circumstantial evidence may create the inference of specific intent. *Barclay, supra* at 674; *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Here, defendant admitted that he had problems with Robert Lee's friends, Calvin Byrd and Terrell Adams, in the summer of 2004. On January 25, 2005, defendant learned that Byrd had shot at defendant's house. Defendant's father, Reginald Abrams, confirmed that someone had shot at this house and that he informed defendant about it. Defendant told Abrams, "I will handle it," and also stated that he was going to "F [Adams] up." Defendant admitted that around 10:30 p.m., he shot at the house at 576 Chalmers Street, where he believed Adams lived. Shortly thereafter, around 10:30 or 10:35 p.m., Lee was shot and killed in front of a party store, located two blocks from 576 Chalmers, as he was getting out of Kanee Goode's blue Oldsmobile. Goode was also shot while sitting in the Oldsmobile. This Oldsmobile was identical to the car that was occasionally parked at 576 Chalmers Street. Lee's wounds were consistent with ammunition fired from a high-velocity assault weapon, such as an AK-47.

Given that witnesses to the Chalmers shooting saw the perpetrators drive off in the direction of the party store and police later discovered that the same AK-47 assault rifle was used at both the Chalmers and party store shooting scenes, it is reasonable to infer that the same perpetrators were involved in both shootings. When this is considered in light of defendant's admissions that he participated in the Chalmers shooting (which he noted occurred before Lee's death), defendant's volatile history with Lee's friends, and the fact that the description of Goode's blue Oldsmobile was consistent with the car that was occasionally parked at 576 Chalmers, it is reasonable to infer that defendant killed Lee deliberately and with premeditation, or at least that defendant aided and abetted the other perpetrators in killing Lee. *Anderson, supra* at 537. To convict a defendant as an aider and abettor, the prosecution must show that

the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. [*People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993).]

Therefore, the evidence was sufficient to support defendant's first-degree murder conviction.

In addition to these facts, given that a dangerous weapon was used in the shooting at the party store, it is reasonable to infer that defendant either intended to kill Goode or aided and abetted in the attempt to kill Goode, and that a successful attempt would have been murder. *McRunels, supra* at 181; *Barclay, supra* at 674. Therefore, the evidence was also sufficient to support defendant's assault with intent to murder conviction. *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

Alternatively, we note that defendant's interview with police, alone, provided a sufficient basis to support defendant's first-degree murder conviction as an aider and abetter. Specifically, defendant admitted that after learning that someone had shot at his house, he offered Marcus Scott some "rims" if he would shoot those responsible. Defendant noted that he provided Scott with the "rims" only after discovering that Scott had shot Lee. From this, it may be inferred that defendant encouraged an act leading to Lee's death and either intended or was aware of Scott's intent to kill Lee. Therefore, the evidence was sufficient to support defendant's conviction according to this version of events. *Jones, supra* at 451.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter